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attorneys should discuss with their clients to the type of invoice if any, which the lenders will require in order to substantiate all services performed.

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Article 1

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Abstract (Article Summary)

WEST PALM BEACH, Fla., Dec. 7 /PRNewswire/ -- Ocwen Technology Xchange, Inc. ("OTX"), the software solutions subsidiary of Ocwen Financial Corporation (NYSE: OCN), today has introduced its **REALTRANS** Web-centric E-commerce solution for real estate transactions located at www.realtrans.com .

John R. Erbey, Chairman and CEO of OTX, said, "The significant benefit of our **REALTRANS** Internet solution is its ability to provide major cost reductions for all parties by saving valuable time and increasing organizational efficiencies. We believe that the **REALTRANS** application, which is based on Extensible Markup Language ("XML"), the Internet's new language of choice, will change the way that real estate business is conducted on the worldwide web. This Internet-based application links banks, brokers, appraisers, agents, title insurers, attorneys, and other ancillary service providers to form a secure virtual environment to facilitate the closing of mortgage and real estate transactions."

Full Text (464 words)

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WEST PALM BEACH, Fla., Dec. 7 /PRNewswire/ -- Ocwen Technology Xchange, Inc. ("OTX"), the software solutions subsidiary of Ocwen Financial Corporation (NYSE: OCN), today has introduced its **REALTRANS** Web-centric E-commerce solution for real estate transactions located at www.realtrans.com .

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The benefits of the **REALTRANS** application begin when a user starts to research data for the purpose of buying, selling, and financing a real estate transaction. The search may include information about the property, buyer and

seller, involved agents, and available loan/lien data. The system electronically links the parties to the transaction to expedite closing. It allows the user to place orders for real estate settlement services and attached relevant documents and messages. From a single desktop, lenders and real estate brokers can easily order and track loan requests, appraisals, title insurance, and escrow services, without the need to rekey data.

Since the **REALTRANS** application is interactive, a service provider with access to the network automatically downloads all orders and attachments upon logging onto the site. Providers can electronically transmit an order confirmation, expected fulfillment date, and pricing to customers. Each party to the transaction has access to relevant information about the property, buyer and seller, agents, and loans within OTX's CLOVERLEAF(TM) product, a centralized, intelligent routing and transaction server capable of XML, X.12, HTTP and FTP transactions without any duplicative data entry. Since this central store is capable of reading and writing XML documents, providers and requestors can eliminate future recoding of business transaction sets once an XML parser processor is in place.

The **REALTRANS**(SM) application is available today for an annual membership fee of \$50 per user, or \$350 for the first ten users from a single organization. Orders may be placed by calling Beth Graham at (561) 682-8436, faxing (561) 682-7100, or e-mailing bgraham@ocwen.com.

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Most real estate closings involve a flurry of papers, a discordance of voices, and fertile media for mistakes. A commercial real estate transaction requires a complex series of negotiations, document drafting, information assembly, and decision making and usually culminates in a tension-packed conference. A competent real estate practitioner will arrive at the closing prepared for the inevitable final negotiations and disarray and armed with a complete closing checklist listing all relevant information and identifying required actions and documents. Preparing a suitable checklist for a commercial real estate closing requires anticipating all contingencies that may arise in the transaction. In general, a closing checklist must contain 3 sections. The first section must demonstrate that all due diligence and precedent factual matters concerning the property have been reviewed. The 2nd section must document the actual transaction and verify that all legal requirements have been met. The 3rd section addresses post-closing matters, such as miscellaneous agreements that must be assigned or resolved.

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"THE CLOSING," A PAINTING THAT appears in many title company conference rooms, depicts a number of persons around a conference table, each engaged in a different task or conversation (with most of the conversation irrelevant to the transaction at hand) while one person—obviously the purchaser's counsel—sits with head bowed reviewing a document (and probably worrying about whether the malpractice premiums have been paid).

Unfortunately, most closings involve a flurry of papers, a discordance of voices, and fertile media for mistakes. A commercial real estate transaction requires a complex series of negotiations, document drafting, information assembly, and decision making and usually culminates in a tension-packed conference. Although the transaction may be completed at the closing, the attorney's involvement may not—especially if the attorney was not well prepared and, in the confusion and excitement of the moment, failed to obtain an important document or missed an important signature.

THE CLOSING CHECKLIST

A competent real estate practitioner, therefore, will arrive at the closing prepared for the inevitable final negotiations and disarray and armed with a complete "Closing Checklist" listing all relevant information and identifying required actions and documents. Just as a successful theatrical performance depends on a carefully constructed script to satisfy the director's critics, a successful real estate closing demands a well-designed checklist to satisfy the attorney's critic—the client.

NOT A STATIC DOCUMENT

The checklist appended to this article is the product of more than 20 years of practice involving scores of complicated closings. It is not, and never will be, a static document. Sophisticated real estate practitioners and their clients, lenders, and title companies are always modifying their requirements to reflect changes in the law and in local custom. In addition, because all real estate is, by definition, unique, the checklist must be adjusted for each closing.

It is customary to prepare a preliminary checklist as soon as the purchaser's "due diligence period is complete and any mortgage loan commitment accepted. The checklist is then adjusted to reflect the lender's requirements and any negotiations during the document drafting process. A final adjustment is made before the closing, thereby assuring a peaceful, successful, and proper denouement (and satisfied "critics").

Also, note that most lenders will provide a loan closing checklist that will contain additional requirements and identify necessary loan documents, opinions, and so on. Request the lender's checklist early in the transaction so difficult issues may be negotiated and the checklist may be compared to the loan commitment's requirements.

In addition, develop separate checklists for important items such as the survey and environmental assessment. You may develop such checklists or obtain them from professional or continuing education sources.

FORMAT OF CHECKLIST

Preparing a suitable checklist for a commercial real estate closing requires anticipating all contingencies that may arise in the transaction. In general, a closing checklist must contain three sections. The first section must demonstrate that all due diligence and precedent factual matters concerning the property have been reviewed. The second section must document the actual transaction and verify that all legal requirements have been met. The third section addresses post-closing matters, such as miscellaneous agreements that must be assigned or resolved.

Only the most important or less evident elements of each part will be discussed below, as most items will be self-explanatory to the experienced real estate practitioner.

The checklist also does not specifically address the requirements of financial institutions. Nonetheless, obtaining the documents and completing the investigations described in the checklist should allow the practitioner to satisfy the requirements of even the most demanding of financial institutions.

It is best to keep a generic all-encompassing checklist on the office word processor to which deletions and additions may be made for each transaction. Although custom checklists may be created from scratch for each closing, the generic list is more likely to prevent errors or omissions.

DUE DILIGENCE MATTERS

The first 10 items in the appended checklist generally cover due diligence matters. Much of the information required by this section will have been obtained during the client's review in preparation for commitment to the transaction. To the extent that such a review has not taken place or is incomplete, it is your responsibility to advise the client of the deficiencies and to assure that they are corrected before closing.

SURVEY

Many clients believe that any survey acceptable to the title company and the lender will suffice. Although a simple boundary survey or "mortgage report" might permit most title companies to remove the schedule B "survey exception to the American Land Title Association ("ALTA") policy, no commercial lender will accept such a simple document in today's regulatory climate—and neither should any competent real estate attorney.

THE ACSM MINIMUM DETAIL SURVEY

The checklist requires an ALTA/American Congress on Surveying and Mapping ("ACSM") Minimum Detail Survey meeting 1992 Standards. This type of survey, especially if the Standard's Table 3(Table 3 omitted) requirements are met, will not only satisfy the title company and lender, but will provide significant information to the client and you regarding conditions at the property as well

as give the client a document upon which it may rely in the future.

The cost will be significantly more than the simple survey and particular attention must be paid to compliance with the various standards and requirements, but the savings will more than offset the increased present expense should a future dispute arise.

If the lender does not impose specific survey requirements or the project is not commercially financed, the practitioner should develop a separate checklist for review of the survey. A good guide is provided by Shannon J. Skinner, *A Practical Guide to Survey Review* (with Checklist), 9 *The Practical Real Estate Lawyer* 45 (Jan. 1993).

ENVIRONMENTAL AUDIT

Environmental issues are obviously hot topics today. avail your client of the "innocent purchaser" defenses available under most environmental statutes, undertake a careful environmental review before closing the transaction. Any real estate attorney who attempts to advise a client without careful attention to these matters is in danger of committing malpractice.

The checklist highlights the important areas to consider in undertaking this review. Most of the items will be supplied by the environmental consultant employed for the transaction. Aside from highlighting the concerns, the checklist does not contain a detailed environmental checklist. Many such checklists are available from professional organizations. One of the best guides will be provided by the American Society for Testing and Materials ("ASTM") in an upcoming practice standard for environmental site assessments.

Owner's Title Insurance

Every competent real estate attorney must be thoroughly familiar with the various title insurance policies in use in the jurisdiction in which the property lies. Unlike property and casualty insurers, most title insurance company agents will not voluntarily suggest helpful endorsements (many of which are provided at no cost). Thus, you must be familiar with the endorsements and the necessity for their use. See Philip J. Bagley III and Mark S. Shiembob, *Getting the Right Title Insurance Endorsements* (with Forms), 4 *The Practical Real Estate Lawyer* 19 (July 1988).

LACK OF CAPACITY OF THE SELLER

Although ALTA Form B title insurance policies insure against losses caused by lack of capacity of the seller and most title companies will have specific requirements to assure proof of capacity, it is important to bring the issue of capacity to the attention of a purchaser as soon as possible during the due diligence period. Lack of capacity of the person signing the purchase agreement can prevent an action for specific performance in the future.

In one case, *Joyce v. Vermulapelli*, 483 N.W.2d 445 (1992), a married individual signed a sales agreement and promised that his wife would agree to the sale. Of course his wife did not and the court held the purchaser had an action for damages, but not for specific performance, since the wife had an interest that she never agreed to sell.

Similar problems occur when a general partner without specific authority agrees to sell a property owned by a limited partnership or a corporate officer agrees to sell property owned by a corporation. If the issue is not addressed early in the due diligence period, the client could expend substantial amounts for surveys, appraisals, etc., only to find that the property was not available for sale.

GOVERNMENTAL INSPECTION

Many lenders are requiring current building inspections. Therefore, you must negotiate in the purchase agreement the right to inspect and the need to produce appropriate documentation and the client must obtain the necessary documentation at an early stage of the transaction. Many transactions have been postponed and loan proceeds reduced while waiting for or after receiving delayed inspections revealing significant repair requirements.

TRANSACTION DOCUMENTATION

Items 11 through 29 cover the actual documentation needed to meet the legal requirements for the real estate transaction.

STATE REQUIREMENTS

Various states have by practice or statute additional documents, disclosures, and certifications common to all closings. For example, in Michigan, Mich. Comp. Laws Ann. Sec421.15(g) (West Supp. 1992) requires disclosure of the seller's employment security account balance and other information at least two days before the sale. Failure to disclose subjects closing agents, including attorneys, to fines and penalties. Other states have environmental disclosures and notifications or certifications that must be recorded at the time the deed is recorded. The checklist must be modified from time to time to reflect these and other new state requirements.

LAND CONTRACTS

In many states, land contracts, contracts for deed, or other title retaining agreements are in wide use in seller financed transactions. There are many reasons for these agreements, including simplicity, ease of understanding, facilitation of forfeiture or foreclosure, and reduction of redemption time.

Recently, however, questions have been raised about the use of such arrangements in commercial transactions when environmental liabilities might exist or arise. Many commentators have been concerned that post-sale environmental contamination might pose liability on the seller under statutes that provide for owner and operator responsibility.

Recently, a Michigan court found that a land contract vendor was in the same position as a mortgagee and therefore had limited, if any, liability for post-sale environmental contamination. *Snediker Developers Limited Partnership v. Evans*, 773 E Supp. 984 (E.D. Mich., 1991). It is too soon to tell whether this decision will be adopted in other jurisdictions or will be upheld on appeal. Thus, continue to be cautious when using these arrangements.

POST-CLOSING AND MISCELLANEOUS MATTERS

Items 30 through 33 and following concern the transfer or resolution of miscellaneous agreements and matters and post-closing items. These items are often overlooked and cause difficulty and additional expense when discovered after closing. The best approach is to note these areas for future action as they arise during the processing of the transaction.

CONCLUSION

The form of the checklist assumes that you will be responsible for coordination of all due diligence and checklist items. It is often helpful to modify the form to indicate a division of responsibility between you, the client, the broker, and others and to provide each party with periodic updates of the checklist so the client, when it arrives, will be smooth and you will appear totally in control.

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Article View[« Back to Results](#)[< Previous Article 44 of 81 Next >](#)[Publisher Information](#)[Print](#)[Email](#)[Mark Article](#)[Abstract](#), [Full Text](#), [Page Image - PDF](#)**Preparing for the commercial real estate closing (part 1)**Joshua Stein. *The Practical Real Estate Lawyer*. Philadelphia: Jul 1999. Vol. 15, Iss. 4; pg. 67, 26 pgs[» Jump to full text](#)

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Throughout the commercial real estate closing, the attorney should develop, distribute, and maintain a current closing checklist. If the transaction will require any governmental or private approvals, the attorney needs to identify them as early as possible and figure out how to obtain them. Any transaction will require due diligence to investigate and validate the facts and circumstances of the real estate. When any real estate transaction begins, one of the first items to think about is title insurance coverage, and the title review process that ultimately culminates in issuance of a title policy. If a transaction involves income-producing commercial real estate, the leases will be crucially important, as they are the source of the rental income that is ultimately the main source of value. If the transaction will refinance existing indebtedness, the attorney needs to think about dealing with the existing lenders that will be paid off. The attorney should determine what documents the closing will require and, to the extent possible, prepare them well in advance.

Full Text (9196 words)

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[Headnote]

To master the many details of a major closing, you need to plan meticulously, prepare and use good checklists, and delegate effectively.

MAJOR COMMERCIAL REAL ESTATE CLOSINGS require management skills and techniques much like those you would need to produce a Broadway show, build a building, or invade a small country.

Every real estate transaction starts with a basic business goal. Then, as the transaction moves from concept to closing documents, the details multiply and so do the players, the documents, and the deliveries. When you are in charge of making the closing happen, you need to anticipate, understand, and to the extent possible, resolve potential complications before the closing. Even "minor details" can, if not anticipated and dealt with ahead of time, wreck the transaction. As with so many other things, preparation is the key to success.

This article summarizes many problems, issues, and concerns that often arise in any commercial real estate closing, and offers some suggestions on how to handle them. It also lists many steps that need to be taken along the way. This article provides a convenient checklist for use in actual transactions to help prevent dropped balls and other problems. This article doesn't, however, fully describe every step that needs to be taken for every possible real estate transaction; instead, in many cases it merely provides a reminder of something that may require further attention. Every category this article covers would itself justify a separate article, or perhaps a book. And any transaction, even a "cookie cutter," will raise its own unique issues and concerns.

Very little summarized here will be new for anyone who has practiced real estate law for more than a year, but even the most seasoned practitioner can sometimes benefit from an organized summary of the pre-closing process.

The real estate transaction addressed in this article could be a multi-site mortgage loan, an acquisition of ground leases in a dozen states, a "corporate" transaction that happens to involve the transfer of 500 leased sites, or any other complex commercial real estate transaction with many players and many properties.

Because the possible transactions range so widely, and because any one transaction often really amounts to two or more smaller ones, any suggestion in this article could apply to almost any transaction—and could also be completely irrelevant or excessive overkill under the circumstances. The purpose here is merely to offer a checklist and a collection of ideas and suggestions. You need to figure out which ones apply to your transaction, and how.

OVERVIEW: SOME GENERAL PRINCIPLES OF THE REAL ESTATE CLOSING PROCESS Whatever transaction you are closing, some fundamental principles will always apply. Keep them in mind from beginning to end.

Very little of the closing process is in fact a legal process. But it is very much a process, and one that the business world expects lawyers to perform, primarily because legal issues can and do arise at any time during the closing process. Therefore, as you push forward on all the different fronts necessary for a real estate closing, be ever alert for the legal issues and problems that can pop up at any time.

Precisely because so little of the real estate closing process is strictly legal, it gives you endless opportunities to delegate work to paralegals and secretaries. To seize those opportunities, you need to identify them early in the process and enlist the right people. Then you need to tell them what they need to know to do their job. If you don't plan ahead, you will end up doing tasks yourself that would have been far more appropriately and effectively performed by others.

Real estate closings are full of third parties: people who need to deliver documents, signatures, information, money, or other things to make the closing happen. Each of those third parties has its own requirements and expectations. Those can take time to identify and handle. Therefore you need to identify all the third parties, and get everything you need from them, as early as possible in the transaction.

The value of a closing checklist is often underestimated. This simple document can give you tremendous control over the closing process—but only if you prepare it properly and use it correctly.

Many wonderful opportunities to simplify your task will emerge in the real estate closing process. Watch for those opportunities and try to seize them.

TART-UP MEASURES: THE TEAM AND THE BIG PICTURE When a transaction begins, you first need to identify the team and get as much information as you can, all as early as possible.

The team will consist not only of your own attorneys and paralegals, but also of representatives of your client, the title insurer, guarantors, "the other side," and other concerned parties. You need to identify all these people at the outset and know how to contact them quickly.

Specialty Staffing

Identify any specialty areas that will be involved. These could include, for example: bankruptcy; tax; ERISA; litigation; and environmental. If you might need help in these areas, try to line it up as early as you can.

Local Counsel

If the transaction will involve property outside your state, select local counsel. Two parties can sometimes share local counsel (for example, borrower and lender), but in that case confirm that an appropriate conflict waiver is in place if needed. The point here isn't that you are responsible for local counsel's ethical issues (although you may be), but that local counsel might not think about conflict waivers until the night before the closing.

They might not focus on the potentially conflicted nature of their role until you persuade them, assuming you are lender's counsel, that you really do want them to tell you how to craft your loan

documents to maximize leverage against the borrower after a default. Then the "conflict waiver" issue may precipitate a last-minute crisis, which may delay the closing, which will be your fault even if it wasn't.

Clarify billing arrangements with local counsel, including ultimate responsibility for payment, requirements for delivery of a final bill at closing, and the like.

Client Contact

If the transaction is fundamentally real estate driven, you will probably work with the client's real estate personnel from the beginning. But should you also be working with people from other areas within the client's organization? How involved does the legal department want to be? If it is a loan, what about the people who will actually handle the logistics of finalizing the loan amount and disbursing the funds? Are there other people involved in loan approval and underwriting with whom you should also be in touch?

If the transaction isn't driven by real estate, you will probably want to obtain a contact person at the client who understands the client's real estate assets and agenda. This person should have access to the client's real estate files and records. You also may need a contact person who will know about the payment of taxes-real estate, corporate, franchise, and other.

If the transaction will involve any financial calculations, try to have the client assign an accounting person to work on the transaction.

Cast of Characters

Find out who-both at the client and in other organizations-will be involved in developing, reviewing, and approving the closing documentation. At the title company, identify the contact person for title insurance work and for closing coordination. Beware of transactions in which escrow is handled separately from title clearance, including the issuance of a title commitment and a policy. Identify who is responsible for title and who is responsible for escrow. Involve both of them and treat them as independent players.

Players' List

Prepare (or make sure someone else is preparing) the players' list, including home addresses, telephone numbers, and email addresses. Distribute these to all persons listed, obtain corrections and additions, and recirculate. Treat this as part of the closing checklist. Just like a closing checklist, it will probably always be in flux.

Data Summary

It can be extremely helpful at the beginning of a transaction to send out a form or checklist to the other side, requesting at one time all the deal-specific information that you will need from them: names, addresses and identifying numbers of parties and guarantors; addresses of property; and names and addresses of participants who are already involved in the transaction when you are first brought into it.

Get the Legal Names of Entities

Obtain all necessary correct legal names, addresses, and states of incorporation of entities, trustees, and the like, as early as possible in the transaction. Identify which entities will need to be formed, and assign responsibility. Reserve names as early as possible. It is astonishing to see how often smart and sophisticated real estate players and their counsel waste vast amounts of time at the last minute because the parties can't use an entity name that they had assumed would be available, and all the documents need to be revised and re-executed.

Determine the principal executive office of borrower. Understand any special capacity of for example, the "trustee" or the "collateral agent." Consider any special provisions required by this special status.

Request that no one change any of these items, once they have been set, until after closing.

Overall Approach

If the transaction isn't fundamentally driven by real estate, determine just how much the real estate part of it matters. What is the significance and relative value of real estate in the larger picture? How much scrutiny of the real estate is required? If due diligence were to reveal that all the real estate had zero value and was actually owned by the Vatican rather than by the borrower, would the transaction still close on the same terms? The answer to this question will affect a great deal of what a real estate lawyer should do when the lawyer is part of the team for a nonreal-estate transaction.

Existing Financing

Consider whether to take existing loan security documents by assignment. Whether this should be done depends on the desires of the parties, the underlying deal structure, and tax considerations

Third-Party Deliveries

Identify any deliveries, including document exhibits, that will need to be prepared or provided by third parties. Allocate responsibility and get people started.

Confidentiality

Ask whether this transaction raises any abnormal confidentiality concerns. Can you assume that people within the client company can know about the transaction? Is it confidential even within the company? If it is generally not a sensitive transaction, are there any particular parts of it, or particular participants, that must be kept confidential?

Delayed Commencement

Often clients are reluctant to bring counsel into a transaction until almost the last minute, because they often don't know whether the deal is "a go" until the last minute, and they don't want to run up legal fees until they are sure about the deal. Try to discourage that approach, because it produces emergencies and fire drills-and ultimately extra expense that could have been avoided.

At least try to encourage the client to deliver the necessary thirdparty documents (title, leases, underlying documents) as soon as it looks like a deal might be on the horizon. That way, when the deal hits you will have what you need and will be able to start work immediately.

STARTUP MEASURES: THE REAL ESTATE Once you have identified the people involved and the basic scope of the transaction, you will next need to start to get your arms around the real estate itself.

Identification

Obtain a list of the relevant properties. Include non-operating properties. What entity owns each site? Understand the existing site and the numbering scheme; establish a new scheme if necessary. Try to obtain the site list in machine-readable form.

Leases

Obtain at least the following basic information for each lease:

Property affected (site number, location, etc.);

Name;

Date of lease;

Remaining term; and

Options

Obtain copies of all leases and related amendments and assignments Cross-check these against the list of leased sites and a rent roll if appropriate.

Pre-Closing Transfers

Consider the need to perfect any conveyances or transfers before the main closing presently contemplated. Is title in the wrong place? What instruments will need to be recorded to correct that situation? Start that process (For any documentation, think about ancillary and related documents, such as additional transfer documents, organizational documents, tax returns, and filings.) Are there tax-planning reasons to suggest that an asset should be moved around before the closing now contemplated?

Choice of Title Company

You may want to control the choice of title company, unless the client desires otherwise or other good reasons exist. Remember, though, that if you insist on using "your" title company and it does a bad job (or is merely perceived as doing a bad job, such as by failing to meet a deadline that was absurd to begin with), it is "your" fault.

If an abstract company or agency is being used, consider the need for an insured closing letter. If needed, obtain it early in the transaction. Negotiate the title insurance premium. Consider seeking bids. The title clearance and title insurance process is otherwise discussed further below.

Unusual Security Mechanisms

If the transaction will include a letter of credit, cash collateral, a stock pledge, interest rate hedges, or other non-real-property security mechanisms, these will usually involve third parties such as banks, custodians, or the like, plus their attorneys. Develop the structure and documentation as early as possible, in consultation with the parties who will have to administer it.

Acquisition Contract

If you represent a lender making a loan to allow the borrower to acquire the mortgaged property, obtain a copy of the purchase and sale contract. This will allow you to:

Validate the purchase price being paid;

Determine whether the borrower is accurately describing the time pressure to close and other business needs allegedly arising from the contract; and

Uncover issues or problems with the property.

For exactly these reasons, borrowers will typically ignore your requests for the purchase and sale contract and hope you will forget, or that if they delay until the last minute you won't actually read the contract when you receive it. The most common excuse is that "the contract is still being negotiated," in which case you need to ask for copies of drafts.

You need to be extremely forceful and persistent about obtaining the purchase and sale contract, particularly including any last-minute amendments that might reduce the purchase price.

Appraisals

Identify any appraisal requirements and arrange staffing and scheduling, or confirm that someone else has. Typically you will have no involvement in the appraisal process. Recognize, however, that an appraisal represents, or should represent, a reasoned analysis of all characteristics of the property, financial and nonfinancial. Therefore, reading the appraisal is typically well worth the hour it will take. In doing so, look for:

Issues and concerns that you might need to address in the closing documents, such as exactly who owns what;

Confirmation that the real property being affected by your closing documents is the same real property that was appraised;

Issues that might limit or restrict your client's rights or interests in that real property, such as use restrictions, rights of third parties, or burdensome contracts or obligations; and

Any other possible problems of any type, such as environmental concerns.

THE CLOSING CHECKLIST

Develop, distribute, and maintain a current closing checklist throughout any transaction, simple or complex. The closing checklist is a roadmap for everything that needs to be done.

What the Closing Checklist Should Say

For maximum value, a closing checklist should:

List every document and the separate elements of each document, such as exhibits and simultaneous deliveries (e.g., tax returns and affidavits) being separately prepared. Normally, no single item in a closing checklist should actually consist of multiple items. Instead, break each separate item out separately;

If appropriate, indicate for each document: who will sign it; how many originals will be required; who is responsible for preparing it; its computer file name; and its status;

Deal separately with documents that apply to the transaction overall versus site-by-site document requirements;

Include not only specific documents, but also events and deliveries that must occur before or at closing -including checks. Anything that needs to be separately noted and kept track of for the closing should be noted and kept track of in the closing checklist rather than exclusively in someone's memory;

Indicate responsibility, by organization and individual, for every item on the list. Make sure others involved in the transaction know what you are expecting of them and are working on it. If the closing becomes a disaster because someone didn't do their job, the client doesn't much care that it "wasn't your fault." They will ask instead why you didn't prevent the problem and why you didn't make sure other people did their jobs;

Indicate the date of each draft of the checklist;

Include a list of participants and their counsel, with all pertinent name and address information, including, as appropriate, fax, email, portables, and home.

How Do You Start a Closing Checklist?

The best way to prepare a closing checklist is by tailoring the final closing checklist from a similar transaction.

Another method is to read through the draft closing documents. Numerous sections of the documents will describe required deliveries, closing conditions that need to be satisfied, and so on. Don't limit your review to the section of the document that talks about documents to be delivered. Read the entire document from beginning to end. For example, the section on "brokerage" may say that one party or another will, at closing, deliver proof that some brokerage commission has been paid. The requirement for that delivery needs to be added religiously to the closing checklist and then tracked through to completion. Otherwise it will be forgotten.

Name the Documents

Give each document an appropriate name that you won't have to change later. The checklist should then indicate the exact name of each document-correctly, the first time, as soon as you add the document to the checklist. This way, people will be able to refer reliably to the checklist when they want to find out exactly how to refer to each document. Continuously update the document list in the closing checklist and cross-check the document titles against the checklist.

Keep the Closing Checklist Current

As the need for each new document, delivery, closing condition, exhibit, rider, or schedule arises, update the closing checklist accordingly. Any time you hear a reference to a piece of paper to be delivered for the transaction, add it to the closing checklist immediately. The closing checklist should always provide an up-to-date reference point for the transaction and every separate document or delivery the transaction will require.

Distribution and Redistribution; Followthrough

Distribute the closing checklist broadly, to all participants. Revise and redistribute it as circumstances change. Make sure anyone with any responsibility for providing any document receives a copy of every distribution of the closing checklist, so they can't say they were unaware of their responsibilities. But don't expect them to read the updated closing checklist. To the extent that you are responsible for a successful closing, communicate regularly with each participant and be sure they are doing what they are expected to do.

Changes

A closing checklist will, and should, change constantly. If you wait until it is "final" you will never distribute it. Print a snapshot of the then-current closing checklist and send it out periodically as the closing approaches.

Consolidated List

Try to have all parties share the same checklist. If each party has their own checklist, you will spend significant time cross-coordinating the checklists and document deliveries-although this process will also reduce the likelihood of mistakes, problems, and gaps.

Of course, if the transaction fundamentally consists of many multiple transactions it may make sense to maintain separate checklists for each. In that case, do it in a way that eliminates overlap and excessive coordination.

CONSENTS AND APPROVALS If your transaction will require any governmental or private approvals, you need to identify them as early as possible and figure out how you will obtain them. They typically require a great deal of lead time.

Public Approvals

If the transaction involves any development or significant changes in existing buildings, you may need building or zoning approval. What approvals are necessary? Which ones are in place? Which ones can be left until after the closing? Is there any chance of obtaining an opinion of permitting or zoning counsel? Are any subdivision approvals needed? Zoning? Building or other codes? Are there any issues regarding the certificates of occupancy? Site plan approval? Make sure someone competent to do so is thinking about these questions.

Miscellaneous Approvals, Clearances, and Consents

Consider the need for any other governmental or legally required pre-clearances. Some examples: Are there Hart-Scott-Rodino reporting requirements pertaining to shopping center, hotel, or other

"transfer of business" transactions?

Are environmental clearances required by environmental laws of any state?

Will you need any "fairness" opinions, or other third-party validations of the transaction? What are the requirements of your client's own organizational documents? Board approval? Shareholder approval? Specified consent or vote? What about any limited partners?

Determine whether any relevant localities require reissuance of certificates of occupancy, or other similar permits, upon or in contemplation of closing.

Determine whether the real property includes an operating business that will be closed or reduced in size and hence may be subject to federal plant closing legislation.

Determine the need for governmental approvals for any other operations on the property or the transfers of the property, such as gaming, liquor, and hazardous activities.

Does this transaction include the sale of a "business" (including hotels, warehouses, or other assets involving significant personal property)? If so you may need to comply with bulk transfer sales statutes (including pre-filing or publication in some cases).

Sales (including subsequent transfers in certain cases) of cooperative or condominium apartments purchased in bulk, or limited partnership interests, may require Martin Act filing in New York. Other state securities laws may apply.

Foreign Investment

If the transaction involves foreign investment in United States real property or other assets, consider whether it must be reported to the federal government. Add appropriate documents to the closing checklist.

Corporate Tax Clearance

If a corporation will be merging, consolidating, or terminating, consider the need for pre-clearance of that event with the state tax collectors.

Private Approvals

What private parties (whether real-estate-related, corporate-debtrelated, or acting in some other capacity) have the right to approve (or disapprove) the contemplated transaction? Does your client need approvals from any of its lenders? Lessors? Other counterparties? How will the approval process work? What notices need to be given? Regardless of what the legal documents say, have the parties thought about whether the necessary approvals will be easy or difficult to obtain, and who should be initiating the process? How is the relationship with the consenting party?

DUE DILIGENCE Any transaction will require "due diligence" to investigate and validate the facts and circumstances of the real estate. Plan it carefully and then control it, or it can easily get out of control. Here are some common and not so common questions to consider. (Leases, title insurance, and surveys are all discussed separately below.)

Practical Site Concerns

Consider practical issues such as access, zoning, use and use restrictions, operations, garbage removal, parking, infrastructure, utilities. Look for problems such as reliance on off-site locations for amenities or building services-and figure out how to solve them. Does the site include any development rights from other sites? Have development rights been transferred to other sites? What effect on the closing process and valuation?

Field Trip

If feasible and appropriate, visit the site. This almost always produces useful and important information.

Real Estate Taxes

Analyze existing real estate taxes. Understand whether the site is already subject to any built-in future increases, such as a gradually eroding tax abatement. Will the transaction itself trigger an increase? Make sure these possible surprises have been reflected in the financial analysis of the deal.

Code Compliance

Building and zoning compliance is often a due diligence "orphan." Attorneys don't want to do it because they "don't do building code." Engineers don't want to do it because they do "physical stuff" Appraisers don't want to do it because they assume it away. Clients don't want to do it, period. So it lingers until the closing, at which point it becomes a crisis. Therefore, work with the client to identify responsibility early and make sure that it gets done.

Related Documents

Identify all pre-existing documents and agreements related to the transaction and, if they may be material, request copies as early as possible, preferably in writing. Pay particular attention to third-party documents that are purportedly the basis for business needs or timing needs. If those documents are slow in coming when requested, you may be surprised at what they ultimately say. Insist on also seeing any amendments

TITLE INSURANCE When any real estate transaction begins, one of the first items to think about is title insurance coverage, and the title review process that ultimately culminates in issuance of a title policy.

Back Title

Does your client or anyone else already have "back title"-existing title policies or reports that may save time for the title process? If so, understand what's available and perhaps have copies provided to whichever title company is handling today's transaction.

Title Orders

Open title orders as early as possible, and give the title company appropriate instructions. You might, for example, advise the title company that:

You want copies of all underlying documents that will survive the closing; and

Title coverage should comply with your standard title specifications, which you should distribute as early as possible.

Make sure that no one else has opened title. If any title requirements are nonroutine or nonobvious (and perhaps in all cases), confirm in writing the directions to the title company, particularly when and to whom the title report(s) are to be distributed. If possible, have the title company, rather than attorneys, make and distribute copies of the title reports to all recipients.

Coordinating the Title Work

Be sure that all title work is properly coordinated and all title issues are properly identified: Consider the need for UCC-1 searches (central and local), judgment searches, tax lien searches, violations searches, and other searches. Order them, if necessary, for all appropriate jurisdictions. Identify any former names of the borrower, perhaps via an officer's affidavit and certificate, and order searches under those names as well. Identify affirmative insurance and endorsement requirements. Consider the need for a tie-in endorsement and other special coverage measures that are unique to multi-site transactions, or any other special endorsements;

Maintain and update the checklist indicating title work received. When a title report is received, check it in and (if appropriate for the particular transaction) make sure the report includes copies of all underlying documents that will survive the closing. Follow through to make sure that you receive all missing underlying documents as soon as possible. Each is a potential last-minute crisis if not received before closing:

Review underlying documents. Deal with any problems they may reveal;

Identify who will receive title insurance coverage, in what amounts, and in the name of what "named insured." Will there be an owner's policy? (Not always);

If the transaction involves multiple sites, ascertain coverage for each site. The allocation of title insurance coverage among sites is a semi-significant business decision, to be made by the client and not the law firm, the title company, or any other party to the transaction;

If the transaction is complex and will involve multiple estates, the title company may offer to insure specified parties "as their interest may appear." This is tantamount to insurance that the sky is blue, provided that it looks blue. The title policy should instead describe each estate and say who holds it and subject to what, because it is the title company's job to provide exactly that assurance;

If the title coverage will exceed the capabilities of a single company, think about reinsurance and coinsurance early. Obtain and review a schedule of proposed reinsurers or coinsurer if more than one company will be represented at closing, require all to agree upon and send a single closer;

Make sure that the following documents and deliveries will be available at closing to the extent required by the title company: resolutions; good standing certificates; and secretary's certificates;

Prepare recording or escrow instructions for the title company's review well before the closing;

To the extent that you or your client will need to remove any title exceptions before closing, identify those requirements and start the process early. Third-party cooperation will often be required, and this takes time;

If any real estate or other taxes are "open," arrange to pay them in a way that is satisfactory to the title company-i.e., sufficient to produce at closing a "paid" receipt or other evidence that the taxes have been paid, other than merely a copy of the owner's check. The municipality may be very slow at posting "recent" payments, so you need to be prepared to show that those payments were made. Make sure someone will obtain a current billincluding any interest and penalties-for the open taxes at closing. Understand how the check should be made payable, and how long the "pay-off" figure in the latest tax bill will be valid;

Identify future tax payments and the period covered. Coordinate with the calculation of tax escrows for closing.

Stock Purchase or Partnership/ LLC Interest Transaction

When your client buys stock or some other equity interest in an existing company, the transaction may not look like a real estate transaction, but it may be one-for example, if the company's major asset is a real estate project. In that case, the equity purchaser may want the company, at closing, to obtain updated title insurance coverage regarding its real estate to confirm that the company still owns the same interests in real estate that the purchaser thinks it does

In that case, the purchaser will also be concerned about certain troublesome boilerplate in the standard title insurance policy. Under that boilerplate language, the title insurer disclaims any liability for unrecorded title problems that the insured (i.e., in this case the company whose equity is being acquired) knew about but didn't disclose to the title company. This boilerplate, if not dealt with, would effectively make the new title insurance coverage worthless, because it would negate coverage against the one source of title problems most likely to be relevant-i.e., the blunders and bad acts of prior management.

The purchaser can solve the problem by asking the title company to issue a "non-imputation endorsement" to protect the purchaser from whatever title problems prior management knew about but didn't disclose to the title company. Before issuing such an endorsement, the title company will typically require an affidavit from someone. If the affidavit comes from the company itself, then the title coverage becomes worthless again, because if one of these title problems arises, the title insurer will simply hit the ball back over the net to the insured.

The purchaser can protect itself by making sure the "non-imputation affidavit" is issued by someone other than the company itself-for example, by the seller of the equity or by the outgoing management of the company. But neither of these parties will be under any obligation to sign the affidavit unless the purchaser thought of the issue during the original contract negotiations. Therefore, if the purchaser cares about this issue, it needs to try to address it in the contract.

A purchaser might also conclude that the entire discussion is a waste of time and effort, depending as always on the business context of the transaction. If the company is an operating business and the purchaser is buying equity, then they are buying all the warts and problems of the company, including all past mismanagement and liabilities of all kinds-not just whatever dumb things management has done to the company's real estate.

If the purchaser has so little confidence in management that it feels the need to spend the money to redate the company's title policies and obtain non-imputation protection, perhaps it shouldn't do a stock or equity deal at all, and should instead buy "pure" assets. Others may differ, particularly if the transaction is fundamentally a real estate transaction. As always, the business context dictates everything.

Warranty Deeds

When a purchaser acquires a real estate portfolio from a creditworthy seller, the parties may be able to structure the transfer in a way that gives the purchaser the benefit of the seller's title insurance coverage, thus reducing the need for the purchaser to buy new title insurance coverage. The savings on title premiums may help both parties create a more financially attractive transaction. Although this technique might not be foolproof and the author isn't aware of any transaction in which anyone ever tried to make a title claim in reliance on this structure, the author has been informally advised by title companies that it should work.

In general, of course, when a seller sells real estate it can't transfer its title insurance coverage to the purchaser. But if the seller issues a warranty deed to the purchaser and suffers a loss because one of the warranties in the deed was incorrect, the seller can make a claim under its title insurance policy if the title problem was one that the original title insurance policy covered. That coverage applies only as of the date the policy was issued, and doesn't cover anything that happened later.

The parties can therefore structure the transaction as follows. The seller conveys the real estate to the purchaser using a warranty deed, with a general warranty against all possible title problems since the beginning of time, but stating that the seller's liability is limited to whatever the seller can recover under its title policy. That limitation doesn't apply to any title problems the seller itself created, including any defects in the transfer from the seller to the purchaser.

These assurances from the seller should give the purchaser almost the equivalent of its own title insurance coverage, at zero cost. To the extent that they don't provide an exact equivalent, the purchaser may conclude that they are close enough, particularly in view of the present savings achieved. And, of course, the structure assumes a creditworthy seller.

If a transaction may be suitable for this "warranty deed" structure, the point needs to be considered as part of contract negotiations, and appropriate provisions negotiated. And anyone using this technique should try to obtain written confirmation that the relevant title insurance company agrees that the technique works.

Pro Forms Policies

If the transaction is complex or will require unusual affirmative coverages or vesting, obtain a "pro forma policy" rather than a commitment. Negotiate with the title company the exact wording of any important but unusual terms of the policy.

Future Transactions

If you know today that the parties already contemplate some future transaction-exercise of a purchase option, or conversion of interim to permanent financingtry to persuade the title company to agree today to issue further title insurance coverage for that future transaction without additional charge when it occurs.

Survey

As part of dealing with title insurance, you also need to deal with obtaining or updating appropriate surveys of the real property affected by the transaction. Here is a short list of crucial steps and suggestions for that process.

As early as possible, consider the need for survey updates. If necessary, order them. See if you can persuade the title insurance company to issue title insurance coverage sufficient to avoid any need to redate surveys.;

Determine to whom (exactly) the survey should be certified, including the representative capacity of, e.g., any "collateral agent." Notify the title company or surveyors in writing of the exact wording of the survey certification;

Make sure that no one else has already ordered a survey;

If the lender has "survey standards," make sure that the surveyor is aware of them-in writingbefore starting work. Make sure that the surveyor complies with them;

When you receive the survey, cross-check it against the legal descriptions and underlying documents. Understand, with the survey, how the site fits together and make sure it is the correct site and the complete site. Look for access problems, signs of wetlands, other practical problems relating to the site. Check setbacks. Understand whether this is all the property involved, or whether additional sites or parcels are now involved or will be involved later. When appropriate, cross-check the survey against the appraisal to make sure that the property surveyed (and described and mortgaged) is the same as the property appraised. Deal with any survey problems

LEASES If a transaction involves income-producing commercial real estate, the leases will be crucially important, as they are the source of the rental income that is ultimately the main source of value. And if the transaction includes leases as assets (e.g., the tenant's position under long-term ground leases), this will raise a separate set of issues.

Due Diligence

Consult with the client regarding the desired breadth and intensity of lease review. Because of their scope, variations, and frequency of amendments, leases can be very labor-intensive. Sometimes a deal will justify full review of every lease, or even preparation of new lease summaries. In other cases, the client will want counsel to quickly skim through the leases, confirming that they exist, that they don't have anything unusual in them, and perhaps that the rent complies with certain financial projections. It all depends on the transaction.

Lease-Related Deliveries

Identify any documentation to be required for leases, such as estoppel certificates and nondisturbance agreements. Prepare the form as early as possible. See to it that the process of obtaining these documents begins as early as possible.

Lease Amendments

To the extent that leases (such as long-term ground leases that are part of the asset package) may need to be amended, commence that process as early as possible. Consider ancillary and related documents, such as memoranda of amendment. Update the closing checklist for any amendments. If any amendments will cost money, establish any necessary escrow arrangements for the closing.

Transfer Mechanics

Identify any requirements that need to be complied with in any assignment or pledge of a lease, including:

The form of assignment and assumption:

Any notices that need to be given, whether before or after the closing; and

Appropriate entries in the closing checklist for all of the foregoing.

EXISTING LENDERS If your transaction will refinance existing indebtedness, you need to think about dealing with the existing lenders that will be paid off. Keep in mind that they might not be happy about being repaid, and hence might not go out of their way to cooperate. Consider at least the following issues.

Releases

As early as possible, open communications with the existing lender. Communicate with the existing lenders' counsel, make arrangements to receive a pay-off letter and releases or assignments in escrow. Give one person primary responsibility for dealing with the existing lender and obtaining all necessary documentation. If the transaction will involve prepayment of an existing loan, consider whether formal prepayment notices must be given (or waiver obtained) a specified period before the closing.

Review the governing loan documents. Identify any problems as early as possible, for consideration by the client. Understand the financing structure. If there is a bank group, make sure that you are dealing with the right representative and they are, in a timely manner, obtaining whatever bank group approvals they need. If they forget or postpone that process—which often happens—it is your closing (not theirs) that may be derailed. A lender that is consenting but not being paid off may treat the transaction as an opportunity to re-document and re-close the loan. Be prepared for the resulting delays and documentation. Update the closing checklist as appropriate.

Loan Pay-Offs

If an existing loan will be paid off, ask the existing lender to confirm by actually finding the documents in the files—that it holds the original note and mortgage documents and will be able to deliver them at closing. If the existing lender can't provide this confirmation, work with the title company, the new lender, and the borrower to resolve the problem. If the existing lender is non-institutional, the loss of the note may create significant problems, particularly if disclosed to the title company only at the last minute.

Satisfaction (Can't Get No)

Make sure that the existing lender doesn't plan to mark its note "void" or its mortgage "satisfied" if the note and mortgage are to be assigned in accordance with practice in New York and some other mortgage tax states.

CLOSING DOCUMENTATION Determine what documents your closing will require and, to the extent possible, prepare them well in advance. Some suggestions follow.

Model Documents

Select an appropriate starting point for each document. Use a comparable document from a similar or comparable transaction, rather than something that comes from the wrong perspective and may require extensive reworking and revision. As appropriate, discuss with the client whether to start with a "one-sided" or "negotiated" document. The answer varies depending on the circumstances. Extra time spent here can save a great deal of time later.

If the client has its own "forms" that it wants to use, make sure that you know about that before you start preparing your documents.

Drafting

Make your first drafts as complete as reasonably possible. If you are sure they won't change, include names, dates, signature blocks, acknowledgments (with as much information as possible already filled in), and cross-references to other documents. Tailor documents as appropriate for the unique circumstances of this transaction. Clone multi-site documents only after the basic form has been worked out and resolved.

Repetition

Try to cover each point only once, to eliminate the need to keep multiple documents consistent. In a loan, the central document will typically be the "loan agreement." Cover as much as possible in that document, and don't repeat it anywhere else unless you have to. Cross-reference the "loan agreement" as necessary. But always make sure that each subject is covered at least once; don't have document A cross-reference document B for a particular provision, and then have document B refer back to document A.

Names of Documents

Assign document names that will help people remember what they are. Don't just call some document an "agreement" or even an "assurances agreement." Call it instead something that distinguishes it from all other agreements and gives a cue as to what it is about (a "personal liability agreement" or a "document delivery agreement" or whatever). If the name of a document changes, update the closing checklist.

Don't Leave Little Gaps

Avoid leaving little gaps in documents, such as blanks to be filled in later, pieces to think through and negotiate later, "incidental" documents that can supposedly be worked out the night before closing or at closing. Every one of these gaps is a crisis waiting to happen, because it will often raise issues and concerns that turn out to be more complicated, and take more time to deal with, than you expected. Identify each little gap. Plug it as early as possible in the pre-closing process. Identify addresses, names, states of incorporation, entity structure for proper signature blocks, and fill in all this information as soon as you can obtain it and know that it won't change. Obtain and review "incidental" documents and exhibits, because more often than not they will raise unexpected issues

Exhibits, Schedules, and Riders

Any substantial document will usually have one or more exhibits, schedules, or riders—attachments that go with the document but don't justify being included in the text. Three types are common in real estate transactions:

Lists of identifying information (e.g., site addresses) so the reader knows what the agreement is about, and the representations and warranties have something to refer to;

Copies of other documents already signed or to be signed for this closing; and

Operative legal provisions that are long-winded or tedious, or apply only once or under particular circumstances (e.g., a checklist for conditions to loan advances).

All three types of attachments are designed to assist the user in understanding and administering the transaction. The second bulleted item is probably not strictly necessary, but it does help assure that related documentation will "travel with" the agreement to which it is attached, for easy reference and administration later.

Preparation

Prepare exhibits, schedules, and riders on the same track as the rest of the document. Don't leave them to "take care of later." Give each one a separate line in the closing checklist. Assign responsibility.

Legal Descriptions

Retype legal descriptions if they aren't readily legible. Proofread them several times. Any mistake in a retyped legal description can ruin the entire transaction. Include outparcels, easements, operating agreements, reciprocal easement agreements, water rights, and any other incidental property rights that travel with the fee estate.

Designation of Exhibits

It is common to designate exhibits by letters "A," "B," and so on, or by the section number of the document where they first arise. Each of these means that someone has to comb through the document, and all related documents, and update or check exhibit references as they change over time—and probably still leave behind some incorrect references. Two alternative approaches are:

Give exhibits names (e.g., "Site List"); or

Give them designations based on what they are rather than their order (e.g., "Exhibit SL" for the site list).

Each of these alternatives is quite nonstandard and sometimes not appreciated, but can save time and prevent mistakes.

Exhibits vs. "Live" Documents

Often, a document will appear both as an exhibit to another document, and as a "live" document in its own right (e.g., a "form of note" attached as an exhibit and an original note executed and delivered at closing). For simplicity, set up this type of document with a cover page that includes its exhibit designation and title. Don't type in "Exhibit _" at the top of the first page of the document itself. By using a cover sheet, you make it easy to work with the two versions of the document without extra hassle. When you want to sign the "execution" counterpart of the document, you simply remove the cover sheet. When you want to treat it as an "exhibit," you leave the cover sheet on. No problem.

Recording

Aside from the obvious candidates for recording, such as deeds and mortgages (or anything else that will be the basis for title insurance), think about the possible need to record any other document that affects a particular estate in real property and should, by its nature, bind any subsequent holder of that estate; for example: estoppel certificates; nondisturbance agreements; consents; and co-ownership agreements.

On the other hand, particularly in high-lax states like New York, any recorded document entails numerous ancillary affidavits and forms, and possibly payment of taxes that could otherwise be avoided. And, of course, any recorded document becomes totally public forever.

Title Company Review

Provide drafts of all recordable documents, and other major documents, to the title company when and as prepared. Then follow through to obtain comments or signoff in particular, treat legal descriptions as documents that require appropriate review by the title company and all interested parties.

Format

For multi-state transactions, include the site number or other site designation at the upper righthand corner of the first page of every document and every exhibit. Perhaps include on the cover of each document its identifying number from the closing checklist, if the closing checklist isn't subject to further change. Comply with state-specific format requirements, such as indicating the correct section, block, and lot of the property in question. In New York City, every recordable document also needs to indicate the street address of the property in question.

Check with local counsel or the title company to be sure you comply with any local requirements. In particular, focus on acknowledgments, tax returns and payments, affidavits, and required legends or disclosures. For a list of each state's acknowledgment forms, look in the portion of Martindale Hubbell that includes summaries of each state's laws

Review and Negotiation

Identify all parties that need to review and approve documents. Don't just send drafts to the obvious recipients. Think about the following additional parties: other investors in the deal; indenture trustee; participants or note purchasers; local counsel; title company (local and, where necessary, central underwriting); and other third parties, including separate counsel representing any of the foregoing.

Cover letters should state the deadline and ask the recipients to take the initiative by calling or, better yet, faxing you a markup with specific line edit changes—if they have any comments. Then actively solicit comments and make sure other people review the comments. Don't mistake silence for acquiescence.

Other People's Comments

You expect to receive lots of comments, changes, objections, and the like regarding your documents from "opposing counsel." Those are easy to deal with and they will always be staring you in the face. But don't forget about comments from the other people mentioned in the preceding paragraph.

At first blush you might resent the process of having "another lawyer looking over your shoulder," such as counsel for the limited partner of your client. If you take a broader view, though, you will soon realize that it is extremely helpful to have someone else on your side who shares your client's interests and can provide a second pair of eyes and a second opinion on issues in my experience, most cocounsel are cooperative and constructive about this process, because they know it is a round world, and on the next transaction the roles could just as well be reversed. And if co-counsel proceeds that way, then the benefits of their involvement far outweigh the detriments.

Among other things, co-counsel can help catch mistakes and inconsistencies. And their involvement indirectly amounts to an insurance policy against sniping and criticism of the documents after the transaction has closed.

Pay attention when your cocounsel, or anyone else, says they can't understand your documents. Even if your documents are perfectly comprehensible and correct in your mind, it is your job to write documents that other people of reasonable intelligence can understand without an annotated explanation from you. When the judge has to read and understand your documents, you probably won't be around to explain. If you are around, the judge probably won't want to hear from you. And the judge won't necessarily be any smarter or more insightful about interpreting your work than whoever is looking at it today and says they can't understand it.

So even if you think it isn't necessary, take the time to fully edit your document as necessary to respond to anyone who says they can't understand it (even if in the back of your mind, you think they must be trying not to understand it, or worse).

Revise and Recirculate

Distribute marked copies of documents showing changes. (Many real estate attorneys prefer crossouts rather than carets for deletions.) As you should for first drafts, distribute enough copies to enough people—everyone who saw the preceding draft. When in doubt, other than because of confidentiality concerns, err on the side of broad distribution. This can help prevent last-minute comments. Be sure local counsel sees the "final" draft.

Distributions to "The Other Side"

Beware of an ethical pitfall: don't send documents or any other communications directly to "The Other Side" (i.e., to the client rather than to counsel) without express written or oral approval by opposing counsel. The rule against direct communications with the opposing client isn't limited to litigation matters.

Conforming Changes

As negotiations move forward, edit the documents as appropriate. But watch for changes that require editing not only of the "main" document but also other documents—so-called "conforming changes." Either make the "conforming changes" in the other document, or figure out a way to revise the document structure so you never need to make conforming changes, and can make all your changes only in one basic document. This can prevent mistakes and inconsistencies.

Avoid Leaving Open Issues

Any issues left to be dealt with at closing will usually take more attention and effort than if dealt with in the normal fashion. Ultimately, open issues left for the closing will usually waste a great deal of time. Try to prevent open issues.

Coordination with Non-Real-Estate Documents

If the transaction you are working on isn't fundamentally a real estate transaction, then you want to make sure the real estate side of it meshes appropriately with the nonreal-estate side. That means you need to review or edit the non-real-estate documents to check references to real estate documents, issues, and closing procedures. Some common problems:

Reasonableness Corporate documents often give the borrower more flexibility than real estate documents, because of differing fundamental premises about the value of the borrower's credit and business judgment versus the ability and need to rely on a so-called "hard asset." Make documents consistent. If necessary, include a "conflicts" clause.

Defaults Make sure the defaults, cure periods, and remedies between the larger transaction and the real estate side of the transaction coincide. This works both ways. If a problem arises with the real estate, at some point it needs to become a default for the larger transaction.

Scope of Security Understand the scope of the assets (whether being mortgaged, leased, bought or sold) intended to be included in the larger transaction. Real estate documents should reflect the business intentions of the parties. Should any sites be excluded? Should any form of related property be excluded?

Real Estate Representation Warranties, and Covenants If the "deal documents" adequately cover real estate issues, consider cutting back the real estate documents so as to be sufficient merely to create whatever interests in real estate the parties want to create, along with appropriate remedies for default.

References

Check references between documents, particularly as defined terms and titles of documents change.

Saving Trees

Try to combine documents. For example, if owner's affidavits are needed for multiple sites, see if the title company will accept a single affidavit covering all sites. Can a single form of mortgage be used, with an exhibit listing all the sites, to save time and paper generating separate mortgages? Is it necessary to have a separate "assignment of lessor's interest in leases" independent of the deed?

The Rest of the Deal

The basic transaction documents rarely fall between the cracks. To the contrary, problems more often arise because the attorneys focus too much on the documents and not enough on everything else. Don't lose sight of the rest of the picture. (Part 2 of this article will appear in the September 1999 issue)

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